CEQ 13

Commonwealth of Massachusetts

State of Connecticut

State of Maine

January 30, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Honorable Christine Todd Whitman, Administrator
United States Environmental Protection Agency 1101A, U.S. EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Notice of Intent to Sue Under Clean Air Act § 7604

Dear Administrator Whitman:

On July 17, 2002, the Attorneys General from eleven states sent a letter to President Bush urging him to reconsider the federal government's climate change policy. The basis of that letter was the recent, comprehensive report: *U.S. Climate Action Report 2002*, U.S. Dept. of State, Washington, D.C., May 2002 ("*Climate Action Report*"). The *Climate Action Report* describes serious consequences of global climate change and repeatedly states the conclusion that emission of carbon dioxide from the burning of fossil fuels is the dominant source contributing to human-caused climate change. As explained in the Attorneys General's letter, we believe that the conclusions set forth in the *Climate Action Report* compel prompt implementation of mandatory reductions of carbon dioxide emissions.

We fully endorse separate efforts by individual States to control carbon dioxide emissions, and some States are undertaking such efforts. For example, Massachusetts has promulgated state regulations designed to reduce carbon dioxide emissions from older power plants. California has enacted a law to limit carbon dioxide emissions from vehicles. Other States are expected to take such steps soon. As stated in the July 17th letter, however, we believe that the most effective and least costly approach to dealing with the climate change problem is through a nationally coordinated, market-based program. We have not seen any appreciable progress on the development of a national program to address carbon dioxide emissions. In fact, the Administration is actively opposing any such program. In seeking to protect the health and welfare of our citizens from the impacts of climate change, we are left to fall back on our available remedies under existing law.

For the reasons set forth below, we believe that you have a mandatory duty under existing law to begin to regulate carbon dioxide as a "criteria air pollutant" pursuant to Section 108 of the Clean Air Act. We also believe that your failure to do so is a violation of the Act for which we are entitled to redress. Accordingly, please consider this letter as a notice of intent to sue pursuant to Section 304 of the Clean Air Act, 42 U.S.C. § 7604, for this violation of the Act.

As EPA Has Recognized, Carbon Dioxide Is an "Air Pollutant" Under the Clean Air Act

The Clean Air Act regulates "air pollutants" in several ways. It is now clear that carbon dioxide is one such "air pollutant" within the meaning of the Clean Air Act. The plain meaning of the broad definition of "air pollutant," in the Act itself, establishes this point. "[A]ir pollutant" is defined in Section 302(g) to include "any physical, chemical, [or] biological . . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g). Unquestionably, carbon dioxide is a physical or chemical substance or matter that is emitted into ambient air. As such, carbon dioxide fits squarely within the Act's definition of "air pollutant." As further support, the Act itself refers to "carbon dioxide" as an "air pollutant." *See* Section 103(g), 42 U.S.C. § 7403(g). The fact that carbon dioxide is a natural constituent of the atmosphere, in addition to being emitted by human activities, fails to un-do its status as an "air pollutant." Other substances that occur naturally in the ambient air, such as ozone, for example, are still regulated as "air pollutant[s]."

The EPA itself has twice officially concluded that carbon dioxide is an "air pollutant." In 1998, EPA General Counsel Jonathan Z. Cannon prepared a formal memorandum, in response to a request from Congressman Tom DeLay, in which he set forth the legal analysis supporting the agency's conclusion that greenhouse gases, including carbon dioxide, are indeed "air pollutants" subject to regulation. Memorandum of Jonathan Z. Cannon, General Counsel, to Carol M. Browner, Administrator, regarding *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources*, dated April 10, 1998. In 1999, EPA General Counsel Gary S. Guzy confirmed and reiterated this position in testimony to Congress in which he presented "the U.S. Environmental Protection Agency's (EPA) views as to the legal authority provided by the Clean Air Act (Act) to regulate emissions of carbon dioxide, or CO2." *Testimony of Gary S. Guzy, General Counsel, U.S. EPA, Before a Joint Hearing of the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs of the Committee on Government Reform and the Subcommittee on Energy and Environment of the Committee on Science,* U.S. House of Representatives, Oct. 6, 1999.

As EPA Has Recognized, Carbon Dioxide Causes or Contributes to Air Pollution Which May Reasonably be Anticipated to Endanger Public Health and Welfare

The Clean Air Act requires EPA to take certain actions when it determines that a pollutant may "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." *See, e.g.,* Clean Air Act Section 108(a)(1), 42 U.S.C.

§ 7408(a)(1). There is no longer any genuine dispute that carbon dioxide emissions are endangering public health or welfare within the meaning of the Act. Notably, Section 302(h) of the Act defines "welfare" to include effects on "weather" and "climate." 42 U.S.C. § 7602(h).

The findings and conclusions set forth in the *Climate Action Report* undeniably establish that carbon dioxide emissions cause or contribute to climate change. The *Climate Action Report* devotes an entire chapter to a discussion of "potential impacts of climate change" and "response options that are designed to increase resilience to climate variations and reduce vulnerability to climate change." *Climate Action Report* at 83; *see Chapter 6: Impacts and Adaptations.* Specifically, the *Climate Action Report* concludes that the dominant source of human-caused climate change is carbon dioxide emissions and that the "the long lifetimes of greenhouse gases [such as carbon dioxide] in the atmosphere and the momentum of the climate system are projected to *cause climate to continue to change* for more than a century." *Climate Action Report* at 82 (emphasis added). In addition to this general concession that carbon dioxide is causing climate change, the *Climate Action Report* details many specific examples of adverse impacts to weather and public health that are occurring, or are likely to occur, such as: increases in temperature, heat index, intense rainfall events, frequency of heat waves, water shortages, drought, sea level, heat stress, diseases from insects, ticks, rodents and water-borne vectors, and health effects due to air pollution and extreme weather events.

Unsurprisingly, the *Climate Action Report* acknowledges the difficulty of predicting what the precise impacts of climate change will be at any given place or time. Such acknowledgments do not undercut the *Climate Action Report's* pervasive conclusions that: climate change is occurring; it is caused by carbon dioxide emissions from human activities; and it poses harm to public health and welfare. Thus, the *Climate Action Report* determines that carbon dioxide emissions "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" within the meaning of the Act. As explained below, the *Climate Action Report* itself has triggered your duty to regulate carbon dioxide pollution under the Clean Air Act.

The *Climate Action Report* was the culmination of an extensive and deliberative effort, conducted by EPA and involving numerous federal agencies, to review and analyze existing scientific data and assessments related to climate change. It was prepared to satisfy reporting obligations of the United States that arise under the United Nations Framework Convention on Climate Change (UNFCCC or Rio Treaty), and it was submitted to the United Nations as the official *Climate Action Report* of the United States. In this context, it states the official position of the United States. Under the Supremacy Clause of the Constitution, U.S. Const., art. VI, paragraph 2, a treaty shares equal footing with federal statutes. Conclusions reported to the United Nations as the formal position of the United States, in satisfaction of treaty obligations, therefore, are of equal import in the context of construing federal statutes. *See generally, Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804) (holding that an act of Congress should be construed consistently with international laws).

We note, as well, that EPA played the lead role in preparation and publication of the *Climate Action Report*, even conducting formal "notice and comment" proceedings on the *Climate Action Report* not once, but twice. 66 Fed. Reg. 15470-71 (Mar. 19, 2001); 66 Fed. Reg. 57456-57 (Nov. 15, 2001). EPA fully reviewed and officially adopted the findings and conclusions of Chapter 6. discussed above, as its own. Moreover, the fact that, after notice and review of comments, EPA reached the conclusions it did, set them out in the *Climate Action Report*, and adopted them as its own, demonstrates that EPA deemed the data and comments it reviewed during that process to be sufficient to support such conclusions. No further notice and comment is necessary to trigger EPA's Clean Air Act obligations.

Consistent with the conclusions of the *Climate Action Report*, both you and President Bush have made numerous statements recognizing that carbon dioxide emissions are endangering public health and welfare and must be reduced. For example, the President has stated that climate change has the "potential to impact every corner of the world," that "the United States is the world's largest emitter of manmade greenhouse gases," and that "[b]y increasing conservation and energy efficiency and aggressively using these clean energy technologies, we can reduce our greenhouse gas emissions by significant amounts in the coming years." Remarks by the President (June 11, 2001). Similarly, you have stated: "If we fail to take the steps necessary to address the very real concern of global climate change, we put our people, our economies, and our way of life at risk." G8 Environmental Ministerial Meeting, Working Session on Climate Change, Trieste, Italy (March 3, 2001).

EPA Has Not Complied with its Mandatory Duty to List Carbon Dioxide as a Criteria Air Pollutant under Section 108.

Pursuant to Section 108(a)(1), "criteria air pollutants" are air pollutants present in ambient air that come "from numerous or diverse mobile or stationary sources" and which, in the Administrator's judgment, "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1). The regulation of such pollutants begins, under Section 108, with a process known as "listing." *See* 42 U.S.C. § 7408(a). Subsequent to listing, the Act requires EPA to set air quality criteria and National Ambient Air Quality Standards in consultation with scientific advisory committees and based on extensive processes to evaluate risks posed by the newly-listed pollutant and to determine the appropriate, allowable levels of it in ambient air. *See* 42 U.S.C. §§ 7408, 7409, and 7417(c)(1). Therefore, under the Act, determination of precisely how, and at what levels, a pollutant should be regulated are only considered post-listing.

As noted above, EPA has already concluded that carbon dioxide is an air pollutant that "cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare." Furthermore, it is an indisputable fact that carbon dioxide emissions "result from numerous or diverse mobile or stationary sources," including power plants, industrial sources and motor vehicles. 42 U.S.C. § 7408(a)(1)(B); *see generally, Climate Action*

Report at 37-42. Given these facts, existing case law compels the conclusion that EPA must now list carbon dioxide as a criteria air pollutant. In *Natural Resources Defense Council v. Train*, 545 F.2d 320 (2d Cir. 1976), the issue was whether the Administrator could be subject to a mandamus action to compel him to list lead as a criteria air pollutant. The Administrator conceded that lead posed a serious risk, but, asserting a preference to exercise his discretion to regulate lead in a different manner, declined to list it. The Court emphatically rejected this approach and held that when it is uncontested that an air pollutant from numerous or diverse sources is contributing to air pollution that "may reasonably be anticipated to endanger public health or welfare," the Administrator has a mandatory duty to list that pollutant pursuant to Section 108. *See NRDC v. Train*, 545 F.2d at 328 ("Once the conditions of §§ 108(a)(1)(A) and (B) have been met, the listing of lead and the issuance of air quality standards for lead become mandatory.")

It is now indisputable that emissions of carbon dioxide from numerous or diverse mobile or stationary sources are contributing to climate change and are thereby endangering public health or welfare. We therefore believe that each factor required under Section 108(a)(1) has been met so that you now have a mandatory duty to list carbon dioxide. Your failure to perform this duty is a violation of the Act. The undersigned States intend to commence an action against you under Section 304 to compel compliance with the mandatory duty to list carbon dioxide as a criteria air pollutant under Section 108.

Effect on Our States

As detailed in the *Climate Action Report*, the consequences of human-caused global climate change due to carbon dioxide emissions in the United States are numerous, wide-ranging, and potentially severe. Such impacts will include increased risks of harm to public health, as well as adverse changes in wildlife and plant species distributions, agricultural activities and productivity, forest productivity, availability of water supplies, and shorelines, to name but a few. Although the specific effects will vary in different regions and localities, it is clear that impacts will occur throughout the northeastern United States. The following are just a few examples of specific projections of impacts within our States.

The *Climate Action Report* documents that average temperatures have already increased 1 degree Fahrenheit (F) over the past century, and it projects that over the next century, average temperatures will likely increase 5-9 degrees F. These increases will be experienced in the northeastern States. On its website, EPA notes that by 2100 temperatures in Massachusetts could increase by about 4 degrees F in winter and spring and about 5 degrees F in summer and fall, with a range of 2-10 degrees F. Precipitation in Massachusetts is estimated to increase by about 10 percent in spring and summer, 15 percent in fall, and 20-60 percent in winter. Temperatures and precipitation will similarly increase in Connecticut and Maine.

These climate changes will have profound consequences for human health. The most direct effect will be an increase in heat-related illness and death. At least one study reported by the EPA on its website projects that in Boston, by 2050, heat-related deaths during a typical summer could increase 50 percent, from close to 100 heat-related deaths per summer to over 150. Increased temperatures will bring with it increased formation of ozone. Because ozone causes adverse respiratory reactions, increased temperatures will result in more ozone related respiratory illnesses. In Connecticut, with its irregular and intense heat waves, just a 2 degree increase in temperature would substantially increase the number of heat related deaths. Connecticut and Massachusetts are already classified as "serious" non-attainment areas for ozone. Southern and coastal Maine is also plagued by ozone pollution, and EPA has proposed to re-designate the southern three counties to a "serious" non-attainment area. Furthermore, increased temperatures will likely lead to northward migration and spread of diseases such as Lyme disease, mosquito-borne illnesses such as West Nile Virus, encephalitis, and possibly dengue fever and malaria, as well as other illnesses that we are not even aware of yet. Leaving aside the monetary value of the deaths, sicknesses, and emotional stress caused by such diseases, the increased prevalence of these illnesses will require our States to increase spending on education, eradication and treatment programs.

Rising sea levels will expose highly developed coastal areas in the northeast to serious risks of flooding and will threaten transportation and sewer infrastructures. Information on EPA's website documents that sea level along the East Coast is rising by 11 inches per century, and it is likely to rise another 22 inches by 2100 in Massachusetts and Connecticut. In Massachusetts, an average of 65 acres of upland is submerged each year as a result of the combination of rising seas and subsiding land. Connecticut's coastline contains important and extensive tidal flats and diverse non-tidal fresh water marshes that may be significantly impaired by rising sea levels. Such changes along the East Coast will require annual expenditures of millions of dollars on coastal stabilization efforts. The cost of sand replenishment along Maine's coast in response to rising sea levels may be as much as $900 million over the next century. Throughout the northeastern United States, sea level rise could inundate sensitive coastal wetlands, destroying habitat for commercial and game species as well as migratory birds and other wildlife.

Climate change attributable to carbon dioxide emissions will have dramatic effects for the quality and nature of life in the northeast. EPA reports that climate change will irreversibly change the composition of northeastern forests, reducing the brilliant fall colors and likely harming tourism. Maine's vast spruce-fir forests will be especially susceptible to insect infestations exacerbated by warming-induced changes in the timing of spring frosts. Other examples are beyond the scope of this submission. Suffice it to say that carbon dioxide emissions will likely cause or contribute to wide-ranging, adverse changes to just about every aspect of the environment, public health and welfare throughout the northeast.

Conclusion

Based on the foregoing, we believe that you have a mandatory duty to list carbon dioxide as a criteria air pollutant pursuant to Section 108 of the Act, and your failure to do so constitutes a violation of the Act. Our primary goal is not litigation, but, rather is to protect the environment and the health and welfare of the citizens of our States. If you are interested in discussing this matter with us, please contact James R. Milkey, Chief, Environmental Protection Division, Massachusetts Attorney General's office at (617) 727-2200, ext. 3347.

Sincerely,

Thomas F. Reilly
Massachusetts Attorney General

Richard Blumenthal
Connecticut Attorney General

G. Steven Rowe
Maine Attorney General

cc: Robert W. Varney, Regional Administrator
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